

**For discussion on
25 January 2021**

Panel on Administration of Justice and Legal Services

Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region ("Supplemental Arrangement")

INTRODUCTION

This paper seeks (a) to inform Members on the signing of a supplemental arrangement (at **Annex A**) to amend the *Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the HKSAR* ("Arrangement") (at **Annex B**) between the Government of the Hong Kong Special Administrative Region ("HKSAR") and the Supreme People's Court ("SPC") on 27 November 2020; and (b) Members' views on the Government's proposal to amend the Arbitration Ordinance (Cap. 609) ("AO") to implement the Supplemental Arrangement.

BACKGROUND

The Current Situation and the Need for the Supplemental Arrangement

2. The Arrangement was signed between the Department of Justice ("DoJ") and SPC on 21 June 1999 which came into effect on 1 February 2000.¹ Having accrued years of implementation experience, and taking into account the comments from the arbitration sector, DoJ conducted a

¹ Before 1 July 1997, reciprocal enforcement of arbitration awards between the Mainland and Hong Kong was governed by the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York on 10 June 1958 (the "New York Convention"). However, being an international agreement, the New York Convention is not applicable to the enforcement of arbitral awards between the Mainland and HKSAR. In the absence of reciprocal arrangement between the two jurisdictions, Hong Kong arbitral awards are not enforceable in the Mainland, and vice versa. The Arrangement was thus signed to rectify the situation. The Arrangement follows as closely as practicable the practice prior to 1 July 1997 and the spirit of the New York Convention and, on the other hand, reflects Hong Kong's status as a Special Administrative Region of the People's Republic of China.

review of the Arrangement, in consultation with SPC.

3. The purpose of signing the Supplemental Arrangement is to bring the Arrangement more fully in line with the current practice of international arbitration. In doing so, reference has been made to the New York Convention, the relevant laws and regulations of the Mainland and HKSAR, as well as the arrangements on mutual assistance on civil and commercial matters signed between (i) the Mainland and the HKSAR; (ii) the Mainland and the Macao SAR; and (iii) the Hong Kong and Macao SARs. As in the case of the Arrangement, the amendments outlined in the Supplemental Arrangement were made in alignment with the spirit of the New York Convention and do not constitute any major change of policy.

Main Provisions of the Supplemental Arrangement

4. The Supplemental Arrangement amends the Arrangement in the following aspects:

- (a) express inclusion of the term “recognition” when referring to enforcement of arbitral awards in the Arrangement for greater certainty;
- (b) express provision to clarify that a party may apply for preservation measures before or after the court’s acceptance of an application to enforce an arbitral award for greater certainty;
- (c) aligning the definition of the scope of arbitral awards with the prevalent international approach of “seat of arbitration” under the New York Convention; and
- (d) removal of the previous restriction of the Arrangement, allowing parties to make simultaneous applications to both the courts of the Mainland and HKSAR for enforcement of an arbitral award.

Amendment (a): Clarification on recognition of arbitral awards

5. Article 1 of the Supplemental Arrangement has included the expression of “recognition” of arbitral awards when referring to enforcement in the Arrangement to clarify and create greater certainty that the recognition of a Hong Kong arbitral award for the purpose of enforcement in the Mainland courts is also covered by the Arrangement, in line with the practice of international arbitration.

6. Apart from the title of the New York Convention, reference to recognition of foreign arbitral awards (in addition to the enforcement proceedings) can also be found in the title and/or text of the relevant Mainland laws and regulations² and the *Arrangement Concerning Mutual Recognition and Enforcement of Arbitral Awards between the Mainland and Macao SAR* (《關於內地與澳門特別行政區相互認可和執行仲裁裁決的安排》), signed in October 2007 (“Mainland-Macao Arrangement”). No such reference, however, was made in the Arrangement prior to the signing of the Supplemental Arrangement.

7. It is not necessary to enact new legislation or amend existing legislation in Hong Kong to implement this amendment. This is because under the existing section 92(2) of the AO, a Mainland award which is enforceable will also be recognised for purposes other than the enforcement of the award.³ In other words, the existing legislation in Hong Kong has already provided for recognition of Mainland awards under the Arrangement and the current amendment has only made it explicit.

² For example, Article 1 of the Provisions of the SPC on Several Issues Concerning the Trial of Cases of Arbitration-Related Judicial Review (《最高人民法院關於審理仲裁司法審查案件若干問題的規定》), which came into effect on 1 January 2018, provides: “*For the purpose of these Provisions, “arbitration-related judicial review case” includes any of the following cases:… (4) a case of an application for recognition and enforcement of an arbitral award made in the Hong Kong Special Administrative Region, the Macao Special Administrative Region, or the Taiwan region.*” (Unofficial English translation, underline added for emphasis)

³ Section 92 of the AO reads as follows:

“92. Enforcement of Mainland awards

(1) A Mainland award is, subject to this Division, enforceable in Hong Kong either—

(a) by action in the Court; or

(b) in the same manner as an award to which section 84 applies, and that section applies to a Mainland award accordingly as if a reference in that section to an award were a Mainland award.

(2) A Mainland award which is enforceable as mentioned in subsection (1) is to be treated as binding for all purposes on the parties, and may accordingly be relied on by any of them by way of defence, set off or otherwise in any legal proceedings in Hong Kong.

(3) A reference in this Division to enforcement of a Mainland award is to be construed as including reliance on a Mainland award.”

Amendment (b): Clarification on application for preservation measures

8. DoJ notes that, as a matter of practice, some Mainland courts have in the past, at the request of the parties, granted preservation measures against respondents' assets before or after accepting an application for enforcement of a Hong Kong arbitral award under the Arrangement. Such practice, however, was not stipulated in the Arrangement prior to the signing of the Supplemental Arrangement.

9. Under sections 21L and 21M of the High Court Ordinance (Cap. 4), HKSAR courts may respectively grant injunctions and interim reliefs before or after the court accepts an application for enforcement of an arbitral award.

10. With reference to the Mainland-Macao Arrangement⁴, Article 4 of the Supplemental Arrangement seeks to clarify that under the Arrangement, parties to a Hong Kong arbitral award may apply to the relevant Mainland court for preservation measures before or after the Mainland court accepts the application for enforcement of the arbitral award.

11. As this amendment to the Arrangement has only clarified and confirmed the prevailing practice and legal position, no legislative amendment is necessary.

Amendment (c): Seat of arbitration approach

12. Prior to the signing of the Supplemental Arrangement, according to the preamble of the Arrangement,

- (i) a Mainland arbitral award is referred to as an arbitral award made pursuant to the Arbitration Law of the People's Republic of China ("PRC") by arbitral authorities in the Mainland as specified in the list supplied by the Legislative Affairs Office of the State Council; and
- (ii) a Hong Kong arbitral award is referred to as an arbitral award made in the HKSAR pursuant to the AO of the

⁴ Article 11 of the Mainland-Macao Arrangement reads as follows:

"Before or after a court accepts the application for the recognition and enforcement of an arbitral award, it may take preservative measures against the respondent's property pursuant to the application by the party concerned and in accordance with the lex fori." (unofficial English translation)

HKSAR.

13. The Supplemental Arrangement re-defines the scope of application of the Arrangement by way of following the seat of arbitration approach to align with the current practice of international arbitration under the New York Convention. If the parties have chosen Hong Kong as the seat of arbitration (also known as “place of arbitration”) in their arbitration agreement, the AO (i.e. the arbitration legislation of the HKSAR) will be the procedural law governing the arbitral proceedings and the resultant award will also be identified as originated from Hong Kong. The seat of arbitration is not related to the identity of the arbitral institution which administers the arbitral proceedings or the location of the hearing. Examples of the seat of arbitration approach can also be found in the relevant Mainland laws and regulations⁵.

14. Article 2 of the Supplemental Arrangement has amended the preamble and Article 1 of the Arrangement to adopt the seat of arbitration approach for the definitions of both the Mainland arbitral awards and Hong Kong arbitral awards:

- (i) a Mainland arbitral award be defined as an arbitral award rendered pursuant to the Arbitration Law of the PRC; and
- (ii) a Hong Kong arbitral award be defined as an arbitral award rendered pursuant to the AO of the HKSAR.

15. To implement this amendment, legislative amendments to the existing legislation in Hong Kong will be required.

Amendment (d): Allowing simultaneous applications for enforcement of an arbitral award in both jurisdictions

16. Prior to the signing of the Supplemental Arrangement, under

⁵ For example, Article 16 of the SPC Concerning Some Issues on the Application of the Arbitration Law of the PRC (《最高人民法院關於適用〈中華人民共和國仲裁法〉若干問題的解釋》) provides: “The law governing the determination of the validity of a foreign-related arbitration agreement shall be the governing law as agreed between the parties; where the parties have agreed on the place of arbitration but not on the governing law, the law of the place of arbitration shall apply; where the parties have not agreed on either the governing law or the place of arbitration or where the agreement on the place of arbitration is unclear, the law of the place where the court is located shall apply.” (unofficial English translation, underline added for emphasis)

Article 2(3) of the Arrangement and section 93 of the AO⁶, parties to an arbitration are prohibited from applying for the enforcement of the same arbitral award simultaneously in both Mainland and the HKSAR. In a recent case, *CL v. SCG* [2019] 2 HKLRD 144, having spent a number of years in vain seeking to enforce a Hong Kong arbitral award in the Mainland, the award creditor then sought enforcement of the award in Hong Kong. It was held by the Court of First Instance in Hong Kong that the enforcement action in Hong Kong was time-barred.⁷ Since the Arrangement in the past prohibited an applicant from applying for enforcement to both the Mainland and the HKSAR courts simultaneously, this case neatly illustrates the need for reform by identifying a lacuna in the scheme under the previous Arrangement. Article 3 of the Supplemental Arrangement has therefore amended Article 2(3) of the Arrangement to lift this restriction to better protect the award creditor. At the same time, safeguards are in place to ensure that the total amount recovered by the applicant would not exceed the amount determined in the arbitral award.

17. Legislative amendment to the AO will be required to implement this amendment.

Benefits of the Supplemental Arrangement for the HKSAR's International Arbitration Services

18. The above Amendments (a) and (b) have clarified the position of the relevant matters that are not crystal clear under the current Mainland laws and regulations. For Amendment (c), the adoption of the re-defined scope of arbitral awards based on the seat of arbitration approach would bring the Arrangement more fully in line with the prevailing international arbitration practice. The implementation of Amendment (d) would lift the restrictions previously in place under the Arrangement on making

⁶ Section 93 of the AO reads as follows:

“93. Restrictions on enforcement of Mainland awards

- (1) *A Mainland award is not, subject to subsection (2), enforceable under this Division if an application has been made on the Mainland for enforcement of the award.*
- (2) *If a Mainland award is not fully satisfied by way of enforcement proceedings taken in the Mainland, or in any other place other than Hong Kong, that part of the award which is not satisfied in those proceedings is enforceable under this Division.”*

⁷ The judge so held even noting that the award creditor was not able under the Arrangement to apply for enforcement of the award in Hong Kong, until the Mainland enforcement proceedings were finally determined and remarking that “[h]owever unfair may be the consequence, there is no express provision in the Arrangement, the relevant Arbitration Ordinance, or the [Limitation Ordinance] itself, that time limitation for enforcement of an arbitral award should not run during the period when a successful party to an arbitral award applies for enforcement on the Mainland.”

simultaneous applications for enforcement of an arbitral award in both the Mainland and HKSAR, which could address the kind of invidious situation as in the case of *CL v. SCG* referred to in paragraph 16 above.

19. The implementation of the Supplemental Arrangement in full will be conducive to the promotion of the development of Hong Kong's legal and dispute resolution services. Hong Kong's status as an international legal hub for legal, deal-making and dispute resolution services will be further enhanced.

Legislative Amendment Proposals Related to Amendments (c) and (d)

20. To implement Amendment (c), it is necessary to amend the definition of "Mainland award" under section 2(1) of the AO in accordance with Article 2 of the Supplemental Arrangement, and delete the definition of "recognized Mainland arbitral authority" under section 2(1) of the AO as well as section 97 of the AO concerning the publication of the list of recognized Mainland arbitral authorities.

21. To implement Amendment (d), it is necessary to repeal section 93 of the AO in accordance with Article 3 of the Supplemental Arrangement.

Implementation of the Supplemental Arrangement

22. In the Mainland, the Supplemental Arrangement is implemented by way of a judicial interpretation as promulgated on 27 November 2020.

23. In Hong Kong, Amendments (a) and (b) can be implemented within the existing legislative framework and have also come into effect on 27 November 2020. Amendments (c) and (d) will come into effect after the necessary amendments to the relevant provisions under the AO have been enacted. Both the Mainland and HKSAR will announce a date on which the relevant provisions in the Supplemental Arrangement shall come into effect after completion of the relevant internal procedures.

CONSULTATION

24. On 22 October 2020, the Advisory Committee on Promotion of

Arbitration⁸ was consulted by the DoJ and the Advisory Committee supported the signing of the Supplemental Arrangement and the related proposal to amend the AO. The signing of the Supplemental Arrangement is also generally welcomed by the legal practitioners and arbitration community in Hong Kong.⁹

WAY FORWARD

25. Subject to Members' view, the Government intends to implement the above legislative proposals by introducing an amendment bill into the LegCo in the first quarter of 2021.¹⁰

Department of Justice
January 2021

⁸ The Advisory Committee on Promotion of Arbitration, chaired by the Secretary for Justice, was set up in December 2014 to advise and assist the DoJ in respect of the promotion of arbitration in Hong Kong.

⁹ For example, see the HKIAC press release on 2 December 2020 (<https://www.hkiac.org/news/hong-kong-and-mainland-china-strengthen-arrangement-enforcement-awards>), an article published by Law.com International on 8 December 2020 (https://www.law.com/international-edition/2020/12/08/hong-kong-mainland-china-strengthen-mutual-enforcement-of-arbitral-awards/?kw=Hong%20Kong%2C%20Mainland%20China%20Strengthen%20Mutual%20Enforcement%20of%20Arbitral%20Awards&utm_source=email&utm_medium=enl&utm_campaign=intnewsalert&utm_content=20201209&utm_term=lawint) and the relevant media interview by the Hong Kong Open TV (<http://www.hkopentv.com/#/videopage/BW02860>). A number of legal practitioners and arbitrators have also published articles in support of the signing of the Supplemental Arrangement, see <https://www.legalhub.gov.hk/#>.

¹⁰ The amendment bill will also update the list of States or territories which are parties to the New York Convention in the Schedule to the Arbitration (Parties to New York Convention) Order (Cap. 609A).

(Courtesy English translation)

**Supplemental Arrangement Concerning Mutual Enforcement of
Arbitral Awards between the Mainland and the Hong Kong
Special Administrative Region**

In accordance with Article 11 of the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (the “Arrangement”), through mutual consultations between the Supreme People’s Court and the Government of the HKSAR, the following supplemental arrangement is made:

1. The procedures for enforcing arbitral awards of the Mainland or the HKSAR as specified in the Arrangement shall be interpreted as including the procedures for the recognition and enforcement of the arbitral awards of the Mainland or the HKSAR.

2. The Preamble and Article 1 of the Arrangement are amended as: “In accordance with the provision of Article 95 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and through mutual consultations between the Supreme People’s Court and the Government of the Hong Kong Special Administrative Region (HKSAR), the following arrangement is made in respect of the issue of mutual enforcement of arbitral awards:

“1. This Arrangement applies to arbitral awards rendered pursuant to the Arbitration Ordinance of the HKSAR as enforced by the People’s Courts of the Mainland, and arbitral awards rendered pursuant to the Arbitration Law of the People’s Republic of China as enforced by the Courts of the HKSAR.”

3. Article 2(3) of the Arrangement is amended as: “If the party against whom the application is filed is domiciled or has property in both the Mainland and the HKSAR which may be subject to enforcement, the applicant may file applications for enforcement with the courts of the two places respectively. The courts of the two places shall, at the request of the court of the other place, provide information on its status of the enforcement of the arbitral award. The total amount to be recovered from enforcing the arbitral award in the courts of the two places must not exceed the amount determined in the arbitral award.”

4. The following paragraph is added to Article 6 of the Arrangement

as Article 6(2): “The relevant court may, before or after accepting the application for enforcement of an arbitral award, impose preservation or mandatory measures pursuant to an application by the party concerned and in accordance with the law of the place of enforcement.”

5. Articles 1 and 4 of this supplemental arrangement will take effect on 27 November 2020, and following the completion of the relevant procedures in the HKSAR, both sides shall announce a date on which Articles 2 and 3 shall commence.

This Arrangement is signed in duplicate in Shenzhen, this 27 November 2020.

Supreme People’s Court

Vice President

The Government of the HKSAR

Secretary for Justice

(Courtesy English translation)

**Arrangement Concerning Mutual Enforcement of Arbitral Awards
between the Mainland and the Hong Kong Special Administrative Region**

In accordance with the provision of Article 95 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and through mutual consultations between the Supreme People's Court and the Government of the Hong Kong Special Administrative Region (HKSAR), the Courts of the HKSAR agree to enforce the awards made pursuant to the Arbitration Law of the People's Republic of China by the arbitral authorities in the Mainland (the list to be supplied by the Legislative Affairs Office of the State Council through the Hong Kong and Macao Affairs Office of the State Council) and the People's Courts of the Mainland agree to enforce the awards made in the HKSAR pursuant to the Arbitration Ordinance of the HKSAR. The following arrangement is made in respect of mutual enforcement of arbitral awards by the Mainland and the HKSAR:

1. Where a party fails to comply with an arbitral award, whether made in the Mainland or in the HKSAR, the other party may apply to the relevant court in the place where the party against whom the application is filed is domiciled or in the place where the property of the said party is situated to enforce the award.

2. For the purpose of Article 1 above, "relevant court", in the case of the Mainland, means the Intermediate People's Court of the place where the party against whom the application is filed is domiciled or the place in which the property of the said party is situated and, in the case of the HKSAR, means the High Court of the HKSAR.

If the place where the party against whom the application is filed is domiciled or the place where the property of the said party is situated falls within the jurisdiction of different Intermediate People's Courts of the Mainland the applicant may apply to any one of the People's Courts to enforce the award. The applicant shall not file his application with two or more People's Courts.

If the place where the party against whom the application is filed is domiciled or the place where the property of the said party is situated is in the Mainland as well as in the HKSAR, the applicant shall not file applications with relevant courts of the two places at the same time. Only when the result of the

enforcement of the award by the court of one place is insufficient to satisfy the liabilities may the applicant apply to the court of another place for enforcement of the outstanding liabilities. The total amount recovered from enforcing the award in the courts of the two places one after the other shall in no case exceed the amount awarded.

3. The applicant shall submit the following documents in applying to the relevant court for enforcement of an award, made either in the Mainland or in the HKSAR:

- i) An application for enforcement;
- ii) The arbitral award;
- iii) The arbitration agreement.

4. An application for enforcement shall contain the following:

(1) Where the applicant is a natural person, his name and address; where the applicant is a legal entity or any other organisation, its name and address and the name of its legally authorised representative;

(2) Where the party against whom the application is filed is a natural person, his name and address; where the party against whom the application is filed is a legal entity or any other organisation, its name and address and the name of its legally authorized representative;

(3) Where the applicant is a legal entity or any other organisation, a copy of the enterprise registration record shall be submitted. Where the applicant is a foreign legal entity or any other foreign organisation, the corresponding notarisation and authentication material shall be submitted;

(4) The grounds for and the particulars of the application for enforcement; the place where the property of the party against whom the application is filed is situated and the status of the property.

Application for enforcement made in the Mainland shall be in the Chinese language. If the arbitral award or arbitration agreement is not in the Chinese language, the applicant shall submit a duly certified Chinese translation of it.

5. The time limit for an applicant to apply to the relevant court for enforcement of the arbitral award, whether made in the Mainland or in the HKSAR, shall be governed by the law on limitation period of the place of enforcement.

6. Upon receipt of an application for enforcement from an applicant,

the relevant court shall handle the application and enforce the award according to the legal procedure of the place of enforcement.

7. The party against whom an application is filed may, after receiving notice of an arbitral award, whether made in the Mainland or in the HKSAR, adduce evidence to show any of the situations set out below. Upon such evidence being examined and any of the said situations being found proved, the relevant court may refuse to enforce the arbitral award:

(1) A party to the arbitration agreement was, under the law applicable to him, under some incapacity, or the arbitration agreement was not valid under the law to which the parties subjected it, or, failing any indication thereon, under the law of the place in which the arbitral award was made;

(2) The party against whom the application is filed was not given proper notice of the appointment of the arbitrator or was otherwise unable to present his case;

(3) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or the award contains decisions on matters beyond the scope of the submission to arbitration. However, if the award contains decisions on matters submitted to arbitration that can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration shall be enforced;

(4) The composition of the arbitral authority or the arbitral procedure was not in accordance with agreement of the parties or, failing such agreement, with the law of the place where the arbitration took place;

(5) The award has not yet become binding on the parties, or has been set aside or suspended by the court or in accordance with the law of the place where the arbitration took place;

If the relevant court finds that under the law of the place of enforcement, the dispute is incapable of being settled by arbitration, then the court may refuse to enforce the award.

The enforcement of the award may be refused if the court of the Mainland holds that the enforcement of the arbitral award in the Mainland would be contrary to the public interests of the Mainland, or if the court of the HKSAR decides that the enforcement of the arbitral award in Hong Kong would be contrary to the public policy of the HKSAR.

8. The applicant, in applying to the relevant court to enforce an arbitral

award, whether made in the Mainland or in the HKSAR, shall pay the enforcement fees prescribed by the court of enforcement.

9. Applications made after 1st July, 1997 for enforcement of arbitral awards, whether made in the Mainland or in the HKSAR, shall be enforced according to this Arrangement.

10. In respect of applications for enforcement made between 1st July, 1997 and the coming into force of this Arrangement, both parties agree that:

Where the applications for enforcement cannot, for some reasons, be made to the court of the Mainland or the court of the HKSAR between 1st July, 1997 and the coming into force of this Arrangement, then, in the case of the applicant being a legal entity or any other organization, the application for enforcement may be made within six months after this Arrangement comes into force and, in the case of the applicant being a natural person, the application for enforcement may be made within one year after this Arrangement comes into force.

Parties to cases which the court of the Mainland or the HKSAR had, between 1st July, 1997 and the coming into force of this Arrangement, refused to handle or to enforce the award, shall be allowed to make fresh application for enforcement.

11. Any problem arising in the course of implementing this Arrangement and any amendment to this Arrangement shall be resolved through consultations between the Supreme People's Court and the Government of the HKSAR.